IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6150

RECEIVED
FEB 26 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

James Michael Mathews

Petitioner

v.

State of Ohio

Respondent

PETITION FOR WRIT OF
CERTIORARI
(ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF OHIO)

James R. Cooper
MORROW, GORDON & BYRD
33 West Main Street
P. O. Box 816
Newark, Ohio 43055
614/345-9611
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	6
PROOF OF SERVICE	7
OPINION OF THE COURT OF APPEALS FOR LICKING COUNTY, OHIO	APPENDIX A
JUDGMENT ENTRIES OF THE SUPREME COURT OF OHIO	APPENDIX B
SECTION 2903.01, OHIO REVISED CODE	APPENDIX C
SECTION 2911.01, OHIO REVISED CODE	APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO._____

RECEIVED
FEB 26 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES MICHAEL MATHEWS, Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI
(ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF OHIO)

JURISDICTIONAL STATEMENT

James Michael Mathews is before this Court on his petition for certiorari from the judgment of the Court of Appeals for Licking County, Ohio, Fifth Appellate District, which affirmed his conviction for aggravated murder and sentence to life imprisonment, on August 9, 1979, and from the judgments of the Supreme Court of the State of Ohio which overruled his motion for leave to appeal and dismissed his appeal as of right on December 7, 1979. He submits this jurisdictional statement to demonstrate this Court's jurisdiction for review by writ of certiorari pursuant to 28 U.S.C. sec 1257 (3).

OPINION BELOW

The opinion of the Court of Appeals for Licking County, Ohio, Fifth Appellate District (CA 2578) is unreported, but is attached as Appendix A. The entries from the Supreme Court of the State of Ohio are attached as Appendix B.

STATEMENT OF THE CASE

This is a criminal case.

Petitioner, James Michael Mathews, was indicted by a Licking County, Ohio, Grand Jury, on a charge of aggravated murder in violation of Section 2903.01 of the Ohio Revised Code in that he purposely caused the death of Steven Daugherty, while committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery. The State of Ohio contended that Petitioner shot and killed his bank robbery accomplice, Steven Daugherty, in a farm house north of St. Louisville, in Licking County, Ohio, where the two had escaped after committing the robbery of the Alexandria Banking Company, Alexandria, Ohio. The case was tried by a jury in the Court of Common Pleas for Licking County, Ohio. Petitioner was convicted on September 1, 1978, and sentenced to life imprisonment. The judgment of the Licking County Common Pleas Court was affirmed by the Court of Appeals for Licking County, Ohio, Fifth Appellate District, by judgment entry filed August 9, 1979. On December 7, 1979, the Supreme Court of the State of Ohio overruled petitioner's motion for leave to appeal from the Court of Appeals and dismissed his appeal as of right for the reasons that no substantial constitutional question existed.

On May 17, 1978, nearly four months prior to his conviction of the aggravated murder (Ohio's version of felony murder) on September 1, 1978, petitioner was convicted by the same trial court of the robbery of the Alexandria Banking Company, Alexandria, Ohio, and sentenced thereon. Petitioner contends that his conviction of the robbery on May 17, 1978, for the underlying felony barred his subsequent trial and conviction for a felony-murder which contained as an element the robbery for which petitioner was convicted in a prior proceeding.

QUESTION PRESENTED

Whether the indictment, trial, and conviction of a person for felony-murder under Section 2903.01 (B) of the Ohio Revised

Code at a time subsequent to the person's conviction and sentence for the underlying felony violates one's rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution?

ARGUMENT

THE INDICTMENT, TRIAL, AND CONVICTION OF A PERSON FOR FELONY-MURDER UNDER SECTION 2903.01 (B) OF THE OHIO REVISED CODE AT A TIME SUBSEQUENT TO THE PERSON'S CONVICTION AND SENTENCE FOR THE UNDERLYING FELONY VIOLATES ONE'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Copies of the pertinent statutes of the Ohio Revised Code are included in Appendix C.

The offense at issue arises from an indictment returned by the Licking County, Ohio, Grand Jury on June 1, 1978. It states the offense of aggravated murder in violation of Section 2903.01 of the Ohio Revised Code. It reads as follows:

> The Jurors of the Grand Jury of the Snate of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that James Michael Mathews on the 17th day of February, 1978, at the County of Licking aforesaid did purposely cause the death of Steven Daugherty, while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery.

On May 17, 178, James Michael Mathews, the same individual as petitioner in this matter, was convicted by the same trial court in Case No. 78-A-13871 of the offense of aggravated robbery. The second count of the indictment in Case No. 78-A-13871 reflects this offense:

> The Jurors of the Grand Jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that James M. Mathews on the 17th day of February, 1978, at the County of Licking aforesaid did in attempting or committing a theft offense at the Alexandria Banking Company, Alexandria, Ohio, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, have a deadly weapon, to-wit: loaded 32 Cal. Revolver on or about his person or under his control.

It is not disputed that the aggravated robbery in the Second Court in the indictment in Case No. 78-A-13871 was the same aggravated robbery referred to in the aggravated murder indictment in the case at hand.

The Fifth Amendment to the United States Constitution provides that no "person (shall) be subject for the same offense to be twice put in jeopardy of life or limb...." The double jeopardy provision of the Fifth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment to the United States Constitution. Benton vs. Maryland, 395 U.S. 784 (1969).

State vs. Best, 42 Ohio St. 2d 530 (1975), sets forth what is necessary under the law of Ohio to sustain a contention of former jeopardy:

> To sustain a plea of former jeopardy it must appear:
> (1) That there was a former proescution in the same state for the same offense;
> (2) that the same person was in jeopardy on the first prosecution;
> (3) that the parties are identical in the two prosecutions; and
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar.

Based upon the above, the issue focuses on whether the aggravated robbery in Case No. 78-A-13871 is the "same offense" for double jeopardy purposes as the aggravated murder in the instant case. Using the tests set out by both the United States Supreme Court and the Ohio Supreme Court, the two offenses must be considered the "same."

Paragraph three of the syllabus in State vs. Best, supra., states as follows:

> The applicable rule under the Fifth Amendment is that where the same act of transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not...

This incorporates the principle of Blockburger vs. United States, 284 U.S. 299 (1932), and is still the prevailing rule in the federal courts. See Brown vs. Ohio, 432 U.S. 161, 53 L. Ed. 2d

187 (1977); State vs. Best, supra. at 534.

Aggravated robbery (the same aggravated robbery for which this petitioner was convicted in Case No. 78-A-13871) is a lesser included offense, under the law of Ohio, of aggravated murder as petitioner was indicted in the instant matter. State vs. Hreno, 162 Ohio St. 193 (1954), held that an offense is a lesser included offense where all the elements in such offense are presence with others in the offense charged in an indictment. In this cause, all the elements of aggravated robbery are present with others in the aggravated murder charge. Aggravated robbery required no proof other than that which was necessary to prove the aggravated murder.

For purposes of double jeopardy, an offense and all its lesser included offenses are the "same" offense. Brown vs. Ohio, supra. State vs. Best, supra. See also Price vs. Georgia, 398 U.S. 323 (1970).

In Harris vs. Oklahoma, 433 U. S. 682 (1977), it was held that when conviction for the greater offense of felony-murder (murder during the court of robbery) could not be had without conviction for the lesser crime (robbery), the double jeopardy clause barred prosecution for the lesser crime after conviction for the greater one. See Brown vs. Ohio, 432 U.S. 161, 53 L. Ed. 2d 187, 196 (1977), where the Court reasoned that the sequence of the convictions was immaterial.

The Double Jeopardy clause of the United States Constitution protects against a second prosecution for the same offense after conviction. It also protects against multiple punishments for the same offense. North Carolina vs. Pearce, 395 U.S. 711 (1969). Petitioner was first convicted of aggravated robbery in May of 1978. By permitting his conviction for the same aggravated robbery in September of 1978 as part of a felony murder conviction, the robbery has been used by the State of Ohio to obtain a conviction for aggravated murder. The petitioner, who received

a sentence of from seven to twenty-five years for aggravated robbery in May of 1978, now finds himself serving a life term for felony-murder as a result of the September, 1978, conviction because the underlying felony was included in the felony-murder indictment. Petitioner has been punished twice for the same aggravated robbery as a result of the separate convictions.

It is submitted that the underlying felony (aggravated robbery) in Case No. 78-A-13871 and the felony-murder (aggravated murder) and the current matter are the "same offense" for double jeopardy purposes and that petitioner's conviction for felony murder cannot be permitted to stand.

CONCLUSION

For the reasons stated, the question presented is substantial and is of great public importance. Petitioner respectfully urges this Court to require the State of Ohio to comply with the constitutional standards of the Fifth Amendment's double jeopardy clause and to overturn petitioner's conviction for felony murder.

RESPECTFULLY SUBMITTED,

James R. Cooper
MORROW, GORDON & BYRD
33 West Main Street
P. O. Box 816
Newark, Ohio 43055
614/345-9611
ATTORNEY FOR PETITIONER

APPENDIX A

IN THE COURT OF APPEALS

FIFTH APPELLATE DISTRICT

LICKING COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee, Case No. CA 2578

- vs -

JAMES MICHAEL MATHEWS,

Defendant-Appellant. O P I N I O N

COOK, J.,

This is an appeal from a judgment of the Licking County C... mon Pleas Court of the conviction and sentence of appellant f... the crime of aggravated murder (R.C. 2903.01).

On February 17, 1978 appellant and one Steven Daugherty ... the Alexandria Bank at Alexandria, Ohio. They left the scen... a blue van which was followed by Chief David Allen of the St... ville Police Department to the residence of a family named M... After a short time, appellant came out of the house and surr... to the police. After appellant was in custody, the police e... the farmhouse and found Steven Daugherty dead.

Appellant was later indicted for aggravated murder in t... purposely caused the death of Steven Daugherty, while commit... attempting to commit or fleeing immediately after committing ... tempting to commit aggravated robbery. He was convicted on ... tember 1, 1978 and sentenced to life imprisonment.

Appellant has appealed his conviction and sentence to this court and filed twelve assignments of error. The assigned errors are without merit.

Appellant's first assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment."

In support of this assigned error, appellant argues the indictment for aggravated murder placed him in double jeopardy in violation of the 5th Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution because he had earlier entered a plea of guilty to the offense of aggravated robbery.

The Supreme Court of Ohio, in Duvall v. State, 111 Ohio St. 657 addressed itself to this problem and, in paragraph one of its syllabus, held:

> "1. An acquittal of a defendant upon the charge of murder in the first degree, while attempting to perpetrate a robbery (under Section 12400, General Code) is not a bar to a prosecution for the crime of robbery (under Section 12432, General Code), even though committed upon the same person named in the former charge, and the robbery was a part of the same criminal act referred to in the indictment for murder."

Clearly a defendant may be charged with both felony murder and the underlying felony, as in the instant case.

Appellant's second assignment of error is as follows:

> "The trial court erred in refusing to allow William Howison, a polygraph expert, to testify on behalf of the defense."

As to the admissibility of the results of a polygraph test in

a criminal case, the Supreme Court of Ohio, in State v. Souel, 53 Ohio St. 2d 123 held:

> "The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> (a) the examiner's qualifications and training;
> (b) the conditions under which the test was administered;
> (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
> (d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.
>
> (4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

A reading of the Souel case clearly indicates the Court contemplates the admissibility of the results of one polygraph test by the testimony of one expert witness with adequate safeguards to the opposing party.

Under such guildelines, the trial court properly refused to allow the appellant to call an expert witness of his own to attempt to discredit the testimony of the expert witness agreed upon by the parties.

Appellant's third assignment of error is as follows:

> "The trial court committed error in refusing to grant defendant's motion for acquittal made at the close of the State's case, and renewed at the close of all the evidence and in refusing to instruct the jury that suicide was the legally accepted manner and mode in which the death of Steven Daugherty occurred, and the legally accepted cause of death."

In support of this assignment of error, appellant argues that the finding that the death of Steven Daugherty was suicide, as set forth in the death certificate issued by the Licking County Coroner was the legal cause of death and, for that reason, the trial court erred in not granting his motions for acquittal and in refusing to give a requested jury instruction to that effect.

R.C. 313.19 states:

> "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

However, a death certificate, as in the instant case, is not a coroner's verdict as contemplated by R.C. 313.19. R.C. 313.19

must be read in paria materia with R.C. 313.17 which gives a county coroner the right to hold an inquest to determine the cause of death. A coroner's verdict is the result of such an inquest. No such inquest was held in the instant cause so there was no coroner's verdict.

Absent a coroner's verdict, an expression by a coroner as to the cause of death is merely an expression of his opinion, but it does not constitute the legal cause of death called for by R.C. 313.19.

Appellant's fourth, fifth, sixth, seventh and eighth assignment of error complain about the court's instructions to the jury and are as follows:

> "4. The trial court committed error in refusing to instruct the jury that a coroner's verdict as to the cause of death and the manner and mode in which the death occurred is entitled to much weight.
>
> 5. The trial court erred in its failure to instruct the jury on the offense of aggravated robbery, a lesser included offense.
>
> 6. The trial court committed error in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.
>
> 7. The trial court committed error in refusing to instruct the jury on the lesser included offense of involuntary manslaughter.
>
> 8. The trial court committed error in giving an instruction to the jury on the issue of "fleeing" which was submitted by the State."

As to the instruction in re the "coroner's verdict", the trial court properly refused to give the requested instruction for the reason set forth above as to the third assignment of error.

As to the failure of the trial court to instruct the jury as to the offense of aggravated robbery, the trial court did not err in refusing to so charge the jury because aggravated robbery is not an included offense of a felony murder for the reasons set forth above as to the first assignment of error.

As to the failure of the trial court to instruct the jury on voluntary and involuntary manslaughter, the trial court did not err since the evidence did not support such charges. A charge on an included offense is to be given only when the evidence supports such a charge. State v. Long, 53 Ohio St. 2d 91; State v. Nolton, 19 Ohio St. 2d 133.

As to the giving of the State's requested instruction as to the crime of robbery, the trial court did not err since the stipulation of fact entered into by the parties stated "The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder in case no. 13940, Licking County Common Pleas Court, State v. Mathews (contained in the original papers in the court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February, 1978. The indictment in case no. 13940 includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight."

Under such a stipulation of fact, the trial court could and did charge the jury as to what constituted the crime of robbery.

Appellant's ninth assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment and to suppress all statements made by

appellant before the Licking County Grand Jury."

This assigned error is without merit. Appellant waived his 5th Amendment rights before he testified before the grand jury. When asked if he had an attorney, appellant replied "Well, what I have got to say I don't need an attorney right now." (Tr 29, pre-trial motions).

We conclude appellant made voluntary statements to the grand jury. There was no evidence that Mr. Cooper, who represented him at the time of his plea to the aggravated robbery charge, was appointed to handle any appeal from his conviction for the aggravated robbery. When told of his right to counsel and asked if he wanted one, appellant indicated he didn't need an attorney.

Appellant's tenth and eleventh assignments of error are as follows:

> "10. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on May 19, 1978, and May 25, 1978,
>
> 11. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on February 17, 1978, February 18, 1978, and February 19, 1978."

These assignments of error are without merit. As to the statements of May 19, 1978 and May 25, 1978, appellant was not only advised of his rights to remain silent and to have a lawyer present and signed written waivers of said rights, but the man to whom he gave the statements on May 19th, Sergeant Eisel, was requested by appellant to come to him in the Licking County jail. Clearly ap-

the statements of February 17 and 19, 1978, the record indicates appellant was advised of the Miranda rights and waived said rights. On February 19, 1978 appellant requested Sgt. Eisel to come to talk to him. On both occasions he signed a written waiver of his rights. Each time appellant indicated to the officers he understood his right and he so testified at the suppression hearing (Pgs. 41 and 45 of Transcript of Pre-trial Motions). On page 46 of said transcript, appellant testified his statement of February 19th was voluntarily made.

Appellant contends he asked for counsel on February 17th, but this was denied by Mr. Lighttiser, the Prosecuting Attorney of Licking County, who was questioning him. The trial court found the appellant waived his rights.

Appellant's twelth assignment of error is as follows:

> "The trial court committed error in overruling appellant's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence."

This assignment of error is without merit. The felony murder statute, R.C. 2903.01(B) does not contain any exceptions. The evidence clearly indicates appellant killed Daugherty to keep for himself the money taken from the bank. This was a pruposeful killing during the perpetration of an

aggravated robbery or fleeing from an aggravated robbery and falls within R.C. 2903.01(B).

A bank teller testified the robbery took place at approximately twenty minutes before 2 P.M. on February 17, 1978 (R. 127-128). Chief Allen, who gave chase, noted that he spotted the blue van on State Route 13 at approximately 2:20 P.M. the same day (R. 149). That is 40 minutes later. He gave immediate chase and followed the van to the Newhouse farm located in the same county. The two men exited the van, ran into the Newhouse residence and thereafter one man emerged declaring he had a hostage.

Allen testified that in the interim he thought he heard gunfire from inside the house. The entire transaction ended at 2:32 P.M. that day when appellant surrendered.

In the case of *State v. Habig (1922), 106 Ohio St. 151,* the following language appears at page 160 from which the court's charge, in the case at bar, was "lifted" verbatim. This is the portion of the charge unsuccessfully challenged in the 8th assignment of error in the case at bar. It reads:

> ".....Though the crime of robbery is complete with only a slight asportation, yet, if the carrying away is in fact a long distance, the crime is still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until

> uninterrupted pursuit is no longer continuously active. The mere fact of delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted does not necessarily segregrate the flight and prevent it being part and parcel of the crime. ...."

The point of the 12th assignment of error is that the robbery was concluded and that also all flight had ended as a matter of law.

We disagree.

We see no reason to believe the legislative purpose was to reduce law enforcements range or to reduce the size of the umbrella of protection of persons from violence.

We see no reason to conclude that there is no legislative purpose to include fellow thieves within the laws protective ambit. After all, todays accomplice is tomorrows state's witness. The execution of a fellow criminal is a crime against the administration of justice because all such persons are potential witnesses.

Secondly, under *Habig, supra,* it is arguable that the robbery itself was not yet concluded in the case at bar. We distill from the added statutory words "or while fleeing immediately after..." a clear legislative purpose to lengthen

the arm of the law.

Accordingly, the 12th assignment of error is overruled.

Judgment affirmed.

Robert E Cook

ROBERT E. COOK, J.
Sitting by assignment from the
Eleventh Appellate District

Putman, P.J. and
Dowd, J. concur.

Norman J Putman

Dawd D Dowd

Putman, P.J., and

Dowd, J., Concur

Atty. James R. Cooper and Steven T. Greene, 33 W. Main St., P.O. Box 816, Newark, Ohio 43055

- For Defendant-Appellant.

Atty. Robert L. Becker and Raymond P. Luther, Prosecuting Attorney Office of Licking County, Courthouse, Newark, Ohio 43055

- For Plaintiff-Appellee.

APPENDIX B

SC75 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19..79.. TERM

To wit: December 7, 1979

State of Ohio,
Appellee,
vs.
James Michael Mathews,
Appellant.

No. 79-1342

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for LICKING *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SC-10A 79-10-1 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

James Michael Mathews,
Appellant.

19 79 TERM

To wit: December 7, 1979

No. 79-1342

APPEAL FROM THE COURT OF APPEALS

for LICKING *County*

This cause, here on appeal as of right from the Court of Appeals for Licking *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Licking *County for entry.*

I, Thomas L. Starlzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... *Clerk*

..... *Deputy*

APPENDIX C

Chapter 2903

HOMICIDE AND ASSAULT

Note: Former Chapter 2903, 2903.01 to 2903.16, repealed by 1972 H 511, eff. 1-1-74.

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

Chapter 2903. defines those offenses, other than assaultive sex offenses, of which the primary thrust is actual or potential harm to persons.

The chapter contains the single capital offense defined in the code, aggravated murder, which includes the planned killing in cold blood, and the purposeful killing committed during kidnapping, rape, arson, robbery, burglary, or escape. The lesser offense of murder is defined simply as the purposeful killing of another.

Elements of the former offense of first degree manslaughter are divided between two sections: voluntary manslaughter, which is knowingly killing another while under extreme emotional stress brought on by serious provocation; and involuntary manslaughter, which is killing another as a proximate result of the commission of a felony. Involuntary manslaughter carries a more severe penalty if the death was caused through commission of a felony than if it resulted from commission of a misdemeanor. Under former law the penalty for manslaughter was the same regardless of whether the offense was voluntary or involuntary, and regardless of the cause of death. Negligent homicide, a new offense, is defined as negligently killing another by means of a deadly weapon or dangerous ordnance.

Two vehicular homicide offenses are included in the chapter, both dealing with killing another while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft. The difference between the two is that the aggravated offense is committed recklessly, while the less serious offense is committed negligently. Former law connected these offenses to the violation of various traffic laws, rather than to the recklessness or negligence of the offender. Also, former law did not provide a homicide offense involving snowmobiles or aircraft, and the offense involving locomotives was obsolete and unenforceable.

Four assault and two menacing offenses are defined in the chapter. Felonious assault is knowingly causing serious physical harm to another by any means, or knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Aggravated assault is the same, except that it is committed while the offender is under extreme emotional stress induced by serious provocation. Thus, felonious assault and aggravated assault complement murder and voluntary manslaughter, respectively. Simple assault and negligent assault offenses are also defined, complementing involuntary manslaughter and negligent homicide, respectively. The two menacing offenses are defined as causing another to believe the offender will harm him or his family or his property, and the distinction between the two is based on the degree of threatened harm.

HOMICIDE

2903.01 Aggravated murder
2903.02 Murder
2903.03 Voluntary manslaughter
2903.04 Involuntary manslaughter
2903.05 Negligent homicide
2903.06 Aggravated vehicular homicide
2903.07 Vehicular homicide

ASSAULT

2903.11 Felonious assault
2903.12 Aggravated assault
2903.13 Assault
2903.14 Negligent assault

MENACING

2903.21 Aggravated menacing
2903.22 Menacing

HOMICIDE

2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 1972 H 511, eff. 1-1-74

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the cold, planned, cold-blooded killing while discarding the notion that an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated in the span of an instant as long as the fatal plan was conceived and executed in the span of time it took to pull the trigger.

principles, and because extrinsic factors such as location and utility enter into real property values. Also, if a structure is destroyed, the land nevertheless remains and makes up part of the value.

The section also incorporates by reference the criteria for determining the value of specific kinds of property, such as securities, found in new section 2913.61 of the Revised Code, in the chapter on theft offenses.

CROSS REFERENCES

Value of property, 5 Am Jur2d, Arson and Related Offenses § 13

Chapter 2911

ROBBERY, BURGLARY, AND TRESPASS

Note: Former Chapter 2911, 2911.01 to 2911.73, repealed by 1972 H 511, eff. 1-1-74

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

[redacted] expands the concept and coverage of former robbery statutes, [redacted] and consolidates a large number of burglary, breaking and entering, [redacted] offenses formerly on the books.

The distinction between robbery offenses is no longer made solely dependent on whether the offender is armed or unarmed at the time of the offense; under the [redacted] the distinction may also depend on whether the offender causes or [redacted] serious harm to anyone, regardless of whether he is armed or unarmed. [redacted] an offender may be guilty of a robbery offense if he uses or [redacted] force not only during the theft or attempted theft, but also during [redacted] afterwards.

Similarly, although whether the structure involved is a dwelling is retained as a [redacted] between burglary offenses, the traditional night-day distinction is discarded. The essential distinction is based on the degree of actual or potential [redacted].

The trespass offense consolidates a variety of former sections, and embodies not only the classic elements of the general offense of criminal trespass, but also deals with trespass in special situations, including trespass on public property.

Safecracking is included in Chapter 2911. because the offense almost always involves [redacted] movable burglary or breaking and entering. Tampering with coin machines is [redacted] as a "minor league" species of safecracking.

ROBBERY

2911.01 Aggravated robbery
2911.02 Robbery

BURGLARY

2911.11 Aggravated burglary
2911.12 Burglary
2911.13 Breaking and entering

TRESPASS

2911.21 Criminal trespass

SAFECRACKING

2911.31 Safecracking
2911.32 Tampering with coin machines

ROBBERY

2911.01 Aggravated robbery

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do any of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

HISTORY: 1972 H 511, eff. 1-1-74

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

This section is framed around the precept that the difference between simple theft and robbery should be that robbery contains an element of actual or threatened personal harm to the victim; and that the degree of actual or potential harm involved should determine the seriousness of a robbery. Thus, aggravated robbery includes not only robbery while armed, but also robbery in which the offender inflicts or attempts serious personal harm, whether he is armed or not, since in both cases there is a high degree of actual or potential harm to persons.

Theft is the basic element in the section, although attempted theft, actual commission of a theft, and flight after the attempt or commission are all included. Thus, a shoplifter who brandishes a gun during his getaway is guilty of an offense under the section. Under former law, the force was required to be in the taking and not in the escape. See, State v Streer, 10 Ohio Nisi Prius (NS) 204, 25 Ohio Dec 277 (1910); Hanson v State, 43 Ohio St 376, 1 NE 136 (1885). Examples of violation include the purse-snatcher who knocks an old lady down and thus causes her to break her hip, the pickpocket who when discovered makes a break for freedom and seriously injures a bystander impeding his flight, and the stick-up artist who relieves another of his wallet at knifepoint but does not harm or attempt to harm his victim.

Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6150

JAMES MICHAEL MATHEWS,

Petitioner

v.

STATE OF OHIO,

Respondent

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

James R. Cooper
MORROW, GORDON & BRYD
33 West Main Street
P.O. Box 816
Newark, Ohio 43055
(614) 345-9611
ATTORNEY FOR PETITIONER

David E. Lighttiser
LICKING COUNTY PROSECUTORS OFFICE
501 Trust Building
Newark, Ohio 43055
(614) 345-0076
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	10
PROOF OF SERVICE	11
APPENDIX A: OPINION OF THE COURT OF APPEALS FOR LICKING COUNTY, OHIO, FIFTH APPELLATE DISTRICT	12
APPENDIX B: STIPULATION OF FACT ENTERED INTO PRIOR TO AGGRAVATED MURDER TRIAL BY AND BETWEEN PETITIONER, HIS ATTORNEYS, AND COUNSEL FOR THE STATE OF OHIO	26
APPENDIX C: SECTION 2941.25 OF THE OHIO REVISED CODE	28

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6150

JAMES MICHAEL MATHEWS,

Petitioner,

v.

STATE OF OHIO,

Respondent,

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

JURISDICTIONAL STATEMENT

Respondent is satisfied with Petitioner's jurisdictional statement.

OPINION BELOW

The copy of the opinion of the Court of Appeals for Licking County, Ohio, Fifth Appellate District, attached to the Petition for Writ of Certiorari is accurate except that the last sentence of page seven (7) of the opinion, found at page fifty-six (56) of the Petition, was inadvertently deleted during copying. A complete copy of the opinion is attached hereto as Appendix A.

STATEMENT OF THE CASE

Respondent agrees with petitioner's Statement of the Case except that prior to the murder trial petitioner asked the state to sign a stipulation of fact, which stated that the aggravated robbery for which petitioner had previously been convicted was the same aggravated robbery which was specified in the aggravated murder charge. This stipulation was signed only after the state added to the stipulation that the aggravated murder indictment also contained allegations of fleeing from the robbery and that the proof (in the aggravated murder trial) would go to defendant's conduct during such flight. This stipulation is attached as Exhibit B.

QUESTION PRESENTED

Respondent agrees that the question set out in petitioner's Petition is present, but this case also presents two other questions:

1. If two individuals commit a bank robbery and one robber purposely kills the other while fleeing from the robbery are the acts of robbery and murder the same for double jeopardy purposes or are the acts distinctly separate criminal offenses?

2. If, even under the facts present in this case, the robbery and the murder are the same acts for double jeopardy purposes, does this case fall within exceptions to the double jeopardy clause of the Fifth Amendment to the United States Constitution?

ARGUMENT

-A-

THE PROSECUTIONS IN THIS CASE FOR AGGRAVATED ROBBERY AND AGGRAVATED MURDER WERE BASED UPON SEPARATE AND DISTINCT CRIMINAL ACTS COMMITTED BY THE PETITIONER.

Petitioner argues that under the double jeopardy rule of Blockburger v. U.S., 284 U.S. 299, 76 L. Ed. 306 (1932) Brown v. Ohio, 432 U.S. 161, 53 L. Ed. 2d 187 (1977), and State v. Best, 42 Ohio St. 2d 530 (1975) the aggravated murder prosecution was barred because the petitioner had earlier been convicted of the aggravated robbery which was part of the aggravated murder charge.

It is not disputed by the State but that the petitioner was convicted of the aggravated robbery of the Alexandria Bank prior

to his trial for aggravated murder. Nor is it disputed but that in his aggravated murder trial the same aggravated robbery was the basis for the felony murder charge. However, it is not necessary or even proper to consider double jeopardy law in this case. Prior to petitioner's trial for aggravated murder, his counsel and counsel for the state entered into a "Stipulation of Fact" wherein it was stated that the aggravated robbery in the murder case was the same aggravated robbery that petitioner had earlier been convicted of, but then the stipulation recites, "The indictment in case no. 13940 (the aggravated murder case) includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight." This stipulation is contained in the original court papers and is attached as Appendix B to this brief. This stipulation makes it clear that the prosecution was focusing on a separate criminal act committed by the petitioner during his flight from the robbery.

The double jeopardy test as set out in Blockburger, supra, and followed in Brown, supra, and Best, supra, is as follows:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of fact which the other does not . . . Brown, supra, at 194, (Emphasis added)

Petitioner is urging this court to disregard that portion of the rule which requires that the same act or transaction be involved before double jeopardy is an issue. This cannot be done because it has long been recognized that the double jeopardy clause does not bar successive prosecutions for separate and distinct criminal acts. It was held in State v. Wallen, 21 Ohio App. 2d 27, 50 Ohio Opns. 2d, 50, affirmed 25 Ohio St. 2d 45 (1969):

> That a defendant has been put in jeopardy upon trial for one criminal act is no bar to a prosecution for a separate and distinct criminal act merely because such acts are closely connected in point of time, place, and circumstances. Wallen, supra, at 36.

and, in State v. Johnson, 112 Ohio App. 124, 16 Ohio Opns. 2d 51 it is stated:

> If the offenses charged are separate and distinct either with respect to statutory definition, or because, as charged, they grow out of different transactions . . . double jeopardy is not applicable.

The same rule has been stated in Dodge v. State, 125 Ohio St. 580, Duvall v. State, 111 Ohio St. 657 (1924), State v. Rose, 89 Ohio St. 383 (1914), Mitchell v. State, 42 Ohio St. 383, and State v. Orth, 106 Ohio App. 35, appeal dismissed 167 Ohio St. 388.

It seems obvious that the crime of aggravated murder and aggravated robbery are both separate and distinct charges and separate and distinct acts. The murder charge was based upon petitioner's actions against or toward another person; the robbery charge based upon his actions against the property of another. The acts are separate and the victims are separate and distinct. This fact alone distinguishes this case from the Brown decision where the criminal act was committed against only one person (the owner of the car) and the subject of the criminal act (the car) remained the same no matter how long Brown kept it or how many times he drove it.

The case at bar can be likened to Hoag v. New Jersey, 356, U.S. 464, 2 L. Ed. 2d 913 (1958) where the defendant held up five different tavern customers at the same time. He was first tried three separate times with each trial involving a different customer and he was acquitted each time. He was tried a fourth time and was convicted. The U.S. Supreme Court affirmed the conviction and held, "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence."

Also, see Cuicci v. Illinois, 356, U.S. 571, 2 L. Ed 2d 983 (1958), in which the defendant was charged in four separate indictments with killing his wife and three children. He was tried once and found guilty of murdering his wife. He was tried again and found guilty of murdering one of his children. In neither case did he receive the death penalty. He was prosecuted a third time, convicted and sentenced to death. The U.S. Supreme Court affirmed the conviction.

The foregoing cases illustrate that separate and distinct acts may be prosecuted in successive actions. This is because the first

part of the double jeopardy test requires that same act of transactions be involved before double jeopardy is an issue at all.

-B-

THE CASE OF BROWN V. OHIO, 432 U.S. 161, 53 L. Ed. 2d 187 (1977) ITSELF ILLUSTRATES THAT DOUBLE JEOPARDY DOES NOT APPLY:

The U. S. Supreme Court, in Brown, based its decision on the fact that the Ohio Court of Appeals had ruled that the crime of joyriding was a lesser included offense of auto theft. At page 195 of L. Ed. the Court stated:

> Here the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio Crimes . . . joyriding is the lesser included offense. Brown, supra.

And, at page 196 of L. Ed.:

> After correctly holding that joyriding and auto theft are the same offense under the Double Jeopardy Clause, the Ohio Court of Appeals nevertheless concluded that Nathaniel Brown could be convicted of both crimes . . . Brown, supra.

Since only one offense was involved - as, according to the Supreme Court, - admitted by the Court of Appeals, double jeopardy applied.

However, the U. S. Supreme Court noted in footnote eight (8), at page 196 of L. Ed.:

> We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense . . . We would also have a different case if in sustaining Brown's second conviction the Ohio Courts had construed the joyriding statute to have that effect. Brown, supra.

The U. S. Supreme Court, in this footnote, recognizes that Ohio courts, "have the final authority to interpret . . . that State's legislation." Garner v. Louisiana, 368, U.S. 157, 7 L. Ed. 2d 207 (1961).

In similar cases to the case at bar, Ohio courts have authoritatively ruled that felony murder and the underlying felony are separate offenses.

In Duvall v. State, 111 Ohio St. 657 (1924), the Ohio Supreme Court considered a case where the defendant had been tried first for the felony murder of one John C. Herbruck and acquitted. He was then

indicted and tried for the robbery of John C. Herbruck. Duvall was convicted of the robbery and the Supreme Court affirmed. It held, at page 669:

> We are of the opinion that the offense of murder in attempting to perpetrate a robbery and the offense of robbery are separate and distinct offenses, and a general verdict of not guilty returned by the jury under the former charge . . . murder . . . is not necessarily an ajudication of . . . guilt . . . of robbery. Duvall, supra.

This approach was also followed in State v. Orth, 106 Ohio App. 35 (1957) when the defendant was first tried and acquitted of felony murder. He was then indicted, tried, and convicted for the underlying felony which was robbery. The Court of Appeals held that the second conviction was proper. An appeal to the Ohio Supreme Court was dismissed. State v. Orth, 167 Ohio St. 388.

The Court of Appeals for Licking County, Ohio, recognizes that under Ohio law aggravated robbery is not a lesser included offense of an aggravated murder charge. See pages 2 and 6 of their opinion found in Appendix A to this Brief.

It should also be noted that the Duvall case was cited and followed in State v. Best, 42 Ohio St. 2d. 530 (1975).

These cases illustrate that Ohio courts have ruled that felony murder and the underlying felony are separate and distinct offenses and even under the test in the Brown case, double jeopardy does not apply.

-C-

EVEN UNDER THE "REQUIRED EVIDENCE TEST" OF BLOCKBURGER AND BROWN THE AGGRAVATED MURDER PROSECUTION OF THE APPELLANT IS NOT DOUBLE JEOPARDY:

The double jeopardy test as set out in Blockburger and followed in Brown is often referred to as the "required evidence test." Each provision under consideration must require proof of a fact which the other does not. Appellant contends that this test cannot be met in the case at bar. However, he has confused the "required evidence" test with the "actual evidence test," the latter having been rejected by the U.S. Supreme Court in Harris v. U.S. 359, U.S. 19, 3 L. Ed 2d 597 (1959). Attention in the "required evidence test" is focused upon the evidence demanded by the definition of the offense. Attention

in the "actual evidence test" is focused on the evidence presented at trial.

The required evidence under Ohio's felony murder statute is that the defendant purposely caused the death of another while committing, attempting to commit or in fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape. Ohio Revised Code Section 2903.01 (B). The required evidence under the aggravated robbery statute is that the defendant in attempting or committing a theft offense, or in fleeing immediately after such attempt or offense did have a deadly weapon on or about his person or inflicted or attempted to inflict serious physical harm on another. Ohio Revised Code Section 2911.01.

It can easily be seen that the required evidence under Ohio's felony murder statute may include aggravated robbery but also may include evidence of some eight other felonies other than aggravated robbery. This, murder plus a listed felony, is the required evidence. The required evidence is not only murder plus aggravated robbery. This is the definition of felony murder. The fact that the actual evidence (that produced at trial) may overlap with a prior trial for the underlying felony makes no difference because the required evidence - that required by the definition of the offense - is murder plus a listed felony and not only murder plus aggravated robbery.

-D-

THE OFFENSES UNDER CONSIDERATION EACH REQUIRE A DIFFERENT DEGREE OF CULPABILITY SO THAT EACH PROVISION DOES REQUIRE PROOF OF A FACT WHICH THE OTHER DOES NOT.

Although the aggravated robbery statute, Ohio Revised Code Section 2911.01 does not itself contain a "culpable mental state," one Ohio case, State v. Bumphus, 53 Ohio App. 2d 171 (1976) has held that the required mental state or culpability is that the accused act "knowingly."

The required mental state or culpability required for a felony murder conviction is that the accused act "purposely.", Ohio Revised Code 2903.01 (B).

Purposely is not required in the aggravated robbery statute and knowingly is not required in the aggravated murder statute so each provision does require proof which the other does not.

-E-

THE UNDERLYING FELONY IN A FELONY MURDER CHARGE IS NOT A LESSER INCLUDED OFFENSE BUT IT MERELY CHARACTERIZES THE OFFENSE AS TO DEGREE.

Under Ohio law, a homicide, if done purposely, is murder. If done purposely and with prior calculation and design, it is aggravated murder. If committed purposely and while committing or attempting to commit a listed felony it is also aggravated murder. This illustrates that the underlying felony in Ohio's felony murder scheme is not a lesser included offense of aggravated murder but only characterizes the offense as to degree - aggravated murder instead of murder. This conclusion has been reached in other jurisdictions. See People v. Nichols, 129 N.E. 883 (1921); People v. Lytton, 178 N. E. 290 (1931); State v. Briggs, 533 S.W. 2d 290 (1976).

This conclusion is even more appropriate when one considers that Ohio follows a "modified" felony murder rule. It is not enough to prove simply murder plus felony. It still must be proved that the murder was committed purposely. The murder is, therefore, premised on independent proof that the killer acted with a purpose. This means that the offenses are separate and distinct. See Newton v. State, 373 A 2d 262 (1977).

-F-

THE CASE AT BAR FALLS UNDER A RECOGNIZED EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE:

At footnote seven (7) page 196, of Brown v. Ohio, 53 L. Ed. 2d 187 (1977), the U. S. Supreme Court notes that to the double jeopardy rule:

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See Diaz v. U.S. 223, U.S. 442, 56 L. Ed. 500 (1912). Brown, supra.

This rule is often applied where the defendant is first tried for the underlying felony but after that trial the victim of the felony dies. See State v. Ross, 2 ONP 368, 4 ODNP 5.

In the case at bar, the petitioner was convicted of aggravated robbery on May 17, 1978, (Tr, 6 Pretrial motions). However, on May 19, 1978, and again on May 25, 1978, the petitioner made statements to a Licking County deputy sheriff who recorded the statements

(Tr 615). This tape was played to the jury at trial. (Tr 616). Also, on May 19, 1978, and on May 25, 1978, the petitioner gave the officer written statements (Tr 617-618). The tape recording was admitted as State's Exhibits 78 and 79. In the recorded and written statements the petitioner also admitted to having shot his bank robbery partner with a sawed-off shotgun.

By the dates of the statements (May 19th and 25th) it is obvious that they were made after the petitioner had been tried and convicted of the bank robbery. Apparently, the petitioner felt he could confess to murder and suffer no consequences.

These confessions are "additional facts" which the prosecution did not have when the petitioner was indicted, tried and convicted of aggravated robbery. The only statement the petitioner made at the time of his arrest was that he had been forced at gun point to commit the bank robbery by Daugherty (the deceased) and that a third party named "Cliff" was involved. Petitioner stated he was outside the house when Daugherty killed himself. (Tr 573-596).

As noted above in his statements of May 19, 1978, and May 25, 1978, the petitioner does admit to the murder of his accomplice. Since this fact - a confession - was not available at the time of petitioner's indictment and trial on aggravated robbery this cause fits squarely within an exception to the double jeopardy provisions of the United States and Ohio Constitutions.

-G-

SINCE UNDER OHIO LAW A DEFENDANT MAY BE CHARGED IN THE SAME INDICTMENT WITH BOTH FELONY MURDER AND THE UNDERLYING FELONY PURSUANT TO REVISED CODE 2941.25 HE IS NOT PREJUDICED BY THE FACT THAT HE IS CHARGED WITH SUCH CRIMES IN SUCCESSIVE INDICTMENTS.

Ohio Revised Code Section 2941.25 provides in pertinent part:

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment of information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Murder is a crime against the person; robbery is a crime against property. Clearly, a defendant who commits murder during the course of a robbery acts with a separage animus during the robbery as opposed

to the murder. He could be charged, therefore, with both crimes in the indictment.

This being true, then he is not prejudiced by successive prosecutions. Double jeopardy would not bar the successive prosecutions unless "mandatory joinder" of all causes of actions theory was the accepted test. Such a theory has been considered but rejected by the U.S. Supreme Court.

CONCLUSION

For the reasons stated, petitioners rights under the Fifth Amendment to the United States Constitution were not violated. The United States Supreme Court should deny certiorari in this matter.

Respectfully submitted,

David E. Lighttiser
Prosecuting Attorney
Licking County, Ohio
501 Trust Building
Newark, Ohio 43055
(614) 345-0076
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

A copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served upon James R. Cooper, 33 West Main Street, P.O. Box 816, Newark, Ohio 43055, attorney for petitioner, this 6 day of May, 1980.

David E. Lighttiser
ATTORNEY FOR RESPONDENT

APPENDIX A

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA-2578
JAMES MICHAEL MATHEWS	:	
Defendant-Appellant	:	

For the reasons as stated in the Memorandum-Opinion on file, all assigned errors are overruled, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed and this cause is remanded to that Court for Execution of sentence.

Norman J. Putman

David D. Dewalt

Robert E. Cook

JUDGES.

IN THE COURT OF APPEALS

FIFTH APPELLATE DISTRICT

LICKING COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee, Case No. CA 2578

- vs -

JAMES MICHAEL MATHEWS,

Defendant-Appellant. O P I N I O N

COOK, J.,

This is an appeal from a judgment of the Licking County Common Pleas Court of the conviction and sentence of appellant for the crime of aggravated murder (R.C. 2903.01).

On February 17, 1978 appellant and one Steven Daugherty robbed the Alexandria Bank at Alexandria, Ohio. They left the scene in a blue van which was followed by Chief David Allen of the St. Louisville Police Department to the residence of a family named Newhouse. After a short time, appellant came out of the house and surrendered to the police. After appellant was in custody, the police entered the farmhouse and found Steven Daugherty dead.

Appellant was later indicted for aggravated murder in that he purposely caused the death of Steven Daugherty, while committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery. He was convicted on September 1, 1978 and sentenced to life imprisonment.

Appellant has appealed his conviction and sentence to this court and filed twelve assignments of error. The assigned errors are without merit.

Appellant's first assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment."

In support of this assigned error, appellant argues the indictment for aggravated murder placed him in double jeopardy in violation of the 5th Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution because he had earlier entered a plea of guilty to the offense of aggravated robbery.

The Supreme Court of Ohio, in Duvall v. State, 111 Ohio St. 657 addressed itself to this problem and, in paragraph one of its syllabus, held:

> "1. An acquittal of a defendant upon the charge of murder in the first degree, while attempting to perpetrate a robbery (under Section 12400, General Code) is not a bar to a prosecution for the crime of robbery (under Section 12432, General Code), even though committed upon the same person named in the former charge, and the robbery was a part of the same criminal act referred to in the indictment for murder."

Clearly a defendant may be charged with both felony murder and the underlying felony, as in the instant case.

Appellant's second assignment of error is as follows:

> "The trial court erred in refusing to allow William Howison, a polygraph expert, to testify on behalf of the defense."

As to the admissibility of the results of a polygraph test in

a criminal case, the Supreme Court of Ohio, in State v. Souel, 53 Ohio St. 2d 123 held:

> "The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> (a) the examiner's qualifications and training;
> (b) the conditions under which the test was administered;
> (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
> (d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.
>
> (4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

A reading of the Souel case clearly indicates the Court contemplates the admissibility of the results of one polygraph test by the testimony of one expert witness with adequate safeguards to

the opposing party.

Under such guildelines, the trial court properly refused to allow the appellant to call an expert witness of his own to attempt to discredit the testimony of the expert witness agreed upon by the parties.

Appellant's third assignment of error is as follows:

> "The trial court committed error in refusing to grant defendant's motion for acquittal made at the close of the State's case, and renewed at the close of all the evidence and in refusing to instruct the jury that suicide was the legally accepted manner and mode in which the death of Steven Daugherty occurred, and the legally accepted cause of death."

In support of this assignment of error, appellant argues that the finding that the death of Steven Daugherty was suicide, as set forth in the death certificate issued by the Licking County Coroner, was the legal cause of death and, for that reason, the trial court erred in not granting his motions for acquittal and in refusing to give a requested jury instruction to that effect.

R.C. 313.19 states:

> "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

However, a death certificate, as in the instant case, is not a coroner's verdict as contemplated by R.C. 313.19. R.C. 313.19

must be read in paria materia with R.C. 313.17 which gives a county coroner the right to hold an inquest to determine the cause of death. A coroner's verdict is the result of such an inquest. No such inquest was held in the instant cause so there was no coroner's verdict.

Absent a coroner's verdict, an expression by a coroner as to the cause of death is merely an expression of his opinion, but it does not constitute the legal cause of death called for by R.C. 313.19.

Appellant's fourth, fifth, sixth, seventh and eighth assignments of error complain about the court's instructions to the jury and are as follows:

> "4. The trial court committed error in refusing to instruct the jury that a coroner's verdict as to the cause of death and the manner and mode in which the death occurred is entitled to much weight.
>
> 5. The trial court erred in its failure to instruct the jury on the offense of aggravated robbery, a lesser included offense.
>
> 6. The trial court committed error in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.
>
> 7. The trial court committed error in refusing to instruct the jury on the lesser included offense of involuntary manslaughter.
>
> 8. The trial court committed error in giving an instruction to the jury on the issue of "fleeing" which was submitted by the State."

As to the instruction in re the "coroner's verdict", the trial court properly refused to give the requested instruction for the reason set forth above as to the third assignment of error.

As to the failure of the trial court to instruct the jury as to the offense of aggravated robbery, the trial court did not err in refusing to so charge the jury because aggravated robbery is not an included offense of a felony murder for the reasons set forth above as to the first assignment of error.

As to the failure of the trial court to instruct the jury on voluntary and involuntary manslaughter, the trial court did not err since the evidence did not support such charges. A charge on an included offense is to be given only when the evidence supports such a charge. State v. Long, 53 Ohio St. 2d 91; State v. Nolton, 19 Ohio St. 2d 133.

As to the giving of the State's requested instruction as to the crime of robbery, the trial court did not err since the stipulation of fact entered into by the parties stated "The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder in case no. 13940, Licking County Common Pleas Court, State v. Mathews (contained in the original papers in the court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February, 1978. The indictment in case no. 13940 includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight."

Under such a stipulation of fact, the trial court could and did charge the jury as to what constituted the crime of robbery.

Appellant's ninth assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment and to suppress all statements made by

> appellant before the Licking County Grand Jury."

This assigned error is without merit. Appellant waived his 5th Amendment rights before he testified before the grand jury. When asked if he had an attorney, appellant replied "Well, what I have got to say I don't need an attorney right now." (Tr 29, pre-trial motions).

We conclude appellant made voluntary statements to the grand jury. There was no evidence that Mr. Cooper, who represented him at the time of his plea to the aggravated robbery charge, was appointed to handle any appeal from his conviction for the aggravated robbery. When told of his right to counsel and asked if he wanted one, appellant indicated he didn't need an attorney.

Appellant's tenth and eleventh assignments of error are as follows:

> "10. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on May 19, 1978, and May 25, 1978,
>
> 11. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on February 17, 1978, February 18, 1978, and February 19, 1978."

These assignments of error are without merit. As to the statements of May 19, 1978 and May 25, 1978, appellant was not only advised of his rights to remain silent and to have a lawyer present and signed written waivers of said rights, but the man to whom he gave the statements on May 19th, Sergeant Eisel, was requested by appellant to come to him in the Licking County jail. Clearly appellant's statements were knowingly and voluntarily made. As to

the statements of February 17 and 19, 1978, the record indicates appellant was advised of the Miranda rights and waived said rights. On February 19, 1978 appellant requested Sgt. Eisel to come to talk to him. On both occasions he signed a written waiver of his rights. Each time appellant indicated to the officers he understood his right and he so testified at the suppression hearing (Pgs. 41 and 45 of Transcript of Pre-trial Motions). On page 46 of said transcript, appellant testified his statement of February 19th was voluntarily made.

Appellant contends he asked for counsel on February 17th, but this was denied by Mr. Lighttiser, the Prosecuting Attorney of Licking County, who was questioning him. The trial court found the appellant waived his rights.

Appellant's twelth assignment of error is as follows:

> "The trial court committed error in overruling appellant's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence."

This assignment of error is without merit. The felony murder statute, R.C. 2903.01(B) does not contain any exceptions. The evidence clearly indicates appellant killed Daugherty to keep for himself the money taken from the bank. This was a pruposeful killing during the perpetration of an

aggravated robbery or fleeing from an aggravated robbery and falls within R.C. 2903.01(B).

A bank teller testified the robbery took place at approximately twenty minutes before 2 P.M. on February 17, 1978 (R. 127-128). Chief Allen, who gave chase, noted that he spotted the blue van on State Route 13 at approximately 2:20 P.M. the same day (R. 149). That is 40 minutes later. He gave immediate chase and followed the van to the Newhouse farm located in the same county. The two men exited the van, ran into the Newhouse residence and thereafter one man emerged declaring he had a hostage.

Allen testified that in the interim he thought he heard gunfire from inside the house. The entire transaction ended at 2:32 P.M. that day when appellant surrendered.

In the case of *State v. Habig (1922), 106 Ohio St. 151,* the following language appears at page 160 from which the court's charge, in the case at bar, was "lifted" verbatim. This is the portion of the charge unsuccessfully challenged in the 8th assignment of error in the case at bar. It reads:

> ".....Though the crime of robbery is complete with only a slight asportation, yet, if the carrying away is in fact a long distance, the crime is still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until

> uninterrupted pursuit is no longer continuously active. The mere fact of delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted does not necessarily segregrate the flight and prevent it being part and parcel of the crime. ...."

The point of the 12th assignment of error is that the robbery was concluded and that also all flight had ended as a matter of law.

We disagree.

We see no reason to believe the legislative purpose was to reduce law enforcements range or to reduce the size of the umbrella of protection of persons from violence.

We see no reason to conclude that there is no legislative purpose to include fellow thieves within the laws protective ambit. After all, todays accomplice is tomorrows state's witness. The execution of a fellow criminal is a crime against the administration of justice because all such persons are potential witnesses.

Secondly, under *Habig, supra,* it is arguable that the robbery itself was not yet concluded in the case at bar. We distill from the added statutory words "or while fleeing immediately after..." a clear legislative purpose to lengthen

the arm of the law.

Accordingly, the 12th assignment of error is overruled.

Judgment affirmed.

Robert E Cook

ROBERT E. COOK, J.
Sitting by assignment from the
Eleventh Appellate District

Putman, P.J. and
Dowd, J. concur.

Norman J Putman

David D Dowd Jr.

Putman, P.J., and

Dowd, J., Concur

Atty. James R. Cooper and Steven T. Greene, 33 W. Main St., P.O. Box 816, Newark, Ohio 43055

- For Defendant-Appellant.

Atty. Robert L. Becker and Raymond P. Luther, Prosecuting Attorney Office of Licking County, Courthouse, Newark, Ohio 43055

- For Plaintiff-Appellee.

APPENDIX B

IN THE COMMON PLEAS COURT OF LICKING COUNTY, OHIO

1978 DEC -7 AM 11:05

22 A 9:46

State of Ohio

PLAINTIFF

vs.

Case No. 78-A-13940

James Michael Mathews

DEFENDANT

STIPULATION OF FACT

The prosecution and the defense in this matter, with the consent of the defendant, hereby enter into the following stipulations:

1. The offense supporting the indictment on the Second Count in case no. 13871, Licking County Common Pleas Court, State vs. Mathews (Exhibit A to Motion to Dismiss Indictment filed herein) consisted of the aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February 1978.

The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder in case no. 13940, Licking County Common Pleas Court, State vs. Mathews (contained in the original papers in the Court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February 1978. The indictment in Case No. 13940 includes allegations of fleeing from this same aggravated robbery and the proof will be to that end to conduct during such flight.

The defendants in both of these above named cases are one and the same individual.

2. The defendant herein was convicted in case no. 13871 of the aggravated robbery referred to above on May 17, 1978.

JUDGE

APPROVED:

Robert L. Becker
Assistant Prosecuting Attorney
ATTORNEY FOR PLAINTIFF

Steven T. Greene
ATTORNEY FOR DEFENDANT

James R. Cooper
ATTORNEY FOR DEFENDANT

DEFENDANT

APPENDIX C

§ 2941.22 Averments [in indictment] as to will or codicil.

In an indictment or information for stealing a will, codicil, or other testamentary instrument, or for forgery thereof, or, for a fraudulent purpose, keeping, destroying, or secreting it, whether in relation to real or personal property, or during the life of a testator or after his death, it is not necessary to allege the ownership or value thereof.

(See former Gen. Code § 13437-21.)

§ 2941.23 Averments [in indictment] as to election.

In an indictment or information for an offense committed in relation to an election, it is sufficient to allege that such election was authorized by law, without stating the names of the officers holding it or the person voted for or the offices to be filled at the election.

(See former Gen. Code § 13437-22.)

[The next section is 2941.25.]

§ 2941.25 Multiple counts [in indictment].

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

(As amended effective Jan. 1, 1974. See also Crim. R. 8(A), 14.)

§ 2941.26 Variance.

When, on the trial of an indictment or information, there appears to be a variance between the statement in such indictment